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No. 86-960

In The
Supreme Court of the United States
October Term, 1986

HIGH TIDE SEAFOODS, et al.,
Appellants,
v.
STATE OF WASHINGTON, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF THE PUYALLUP INDIAN TRIBE, AS AMICUS CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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INTEREST OF THE AMICUS CURIAE

The Puyallup Indian Tribe is a party to the Treaty of Medicine Creek, 10 Stat. 1132 (1855). Article III of that Treaty provides:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, . . .

Puyallup tribal members participate in the salmon harvest pursuant to their fishing rights secured by this Treaty as affirmed in *Washington v. Fishing Vessel Ass'n,* 443 U.S. 658 (1979). Tribal fishermen are protected from state taxation by this Court's decision in *Tulee v. Washington,* 315 U.S. 681 (1942). Appellant High Tide Seafoods purchases fish from tribal members.

Commercial fishing pursuant to the treaty right is a major source of income for many tribal members. In addition, this exercise of the treaty right has provided the Tribe with a revenue base which bolsters the tribal goal of self-sufficiency. Section 14 of the Puyallup Fisheries Management Code imposes a tax on tribal fishermen:

> The Puyallup Nation hereby imposes a gross receipts tax on each tribal member and authorized fisher who engages in commercial fishing pursuant to the treaty fishing rights of the Nation and on each act of fishing pursuant to those rights. The tax is imposed for the privilege of exercising those treaty fishing rights, in order to help defray a portion of the cost of the Nation's fisheries management and regulatory program. . . .

The tax rate is set at two cents per pound of fish sold. The relevant sections of the Puyallup Fish Tax Ordinance are reproduced in the Appendix.

The state tax upheld by the Washington Supreme Court (RCW 82.27.020 (1981)), poses tribal fishermen with Hobson's choice: either indirectly pay the tax by reducing the price of their fish, or not sell the fish. The shift of the economic burden of the tax to Indian fishermen violates the Tribe's treaty rights and directly impacts the revenues of the Puyallup Tribe and its fishermen.

The failure of the state tax to grant a credit for tribal taxes, while granting one for taxes of other states, also directly impacts the Tribe's ability to raise money through taxation, and is a denial of equal protection of the laws to the Tribe and its members.

This brief is filed with the consent of the parties, whose letters of consent have been lodged with the Clerk.

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THE ISSUES PRESENTED ARE SUBSTANTIAL AND IMPORTANT

The State of Washington has gone through "extraordinary machinations" to subvert federal decisions enforcing Indian fishing rights guaranteed by treaty. *Washington v. Fishing Vessel Ass'n, supra,* 443 U.S. at 696, n.36. The state supreme court's decision here shows the same lack of respect for Indian rights and decisions of this Court, and should be corrected either by summary reversal or after plenary hearing. Moreover, if allowed to stand, Washington's method of avoiding the impact of this Court's decision in *Tulee v. Washington* may lead to similar attempts in the numerous other states where Indians have treaty fishing rights.[1]

It has been clear, at least since this Court's decision in *Tulee v. Washington, supra,* that the State of Washington had no authority to tax an Indian's exercise of his

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[1]Such rights exist in the Pacific Northwest, in Alaska, in the Great Lakes states, as well as within various reservations in other states. *See* Cohen's *Handbook of Federal Indian Law,* 1982 edition, pp. 442-46.

treaty protected fishing rights. The State, to avoid this result, has abolished its taxes on fishermen's catches (former RCW 75.32 (1962)) and established a tax on the fish purchaser. This tax has extraordinarily given the purchaser a right—but no duty—to collect half of the tax from the seller. (RCW 82.27.020 (1981)). This extraordinary "option" on the part of the purchaser is for no other purpose than to let the purchaser do what the State could not do. The purchaser must pay the tax in full whether he collects it or not. Ordinarily he collects it from the non-Indian seller and passes it along to the State. He cannot lawfully collect it from the Indian seller because of *Tulee v. Washington*. The purchaser thus is forced either not to buy from the Indian—because the purchaser cannot recoup his tax—or to pay the Indian less—thereby recouping his tax and subverting the Indian's tax immunity. In the present case, however, the purchaser properly chose a third course—to challenge the tax.

The Washington Supreme Court acknowledged the consequences of the State's taxing scheme, but it nevertheless concluded that RCW 82.27.020 is valid because the "parties have the opportunity to allocate the burden among themselves by adjusting the price", i.e., by the treaty Indian fisherman agreeing to accept less for his fish. *Pet. App. at 11.* The loss of revenue to the treaty Indian fisherman resulting from the Washington taxing scheme can be viewed in two ways, either as a state-imposed diminution of the market value of the Indian's fish if the Indian exercises his federally guaranteed immunity from state tax, or as indirect payment of half the fish excise tax by the Indian just as if he had no immunity.

Viewed either way, the Washington taxing scheme is patently invalid under federal law. As a diminution in the market value of the Indian's fish because the Indian exercises a federal right, it unfairly discriminates against, and places an undue burden on, Indian commerce. *See, Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 153-54 (1982) (Indian commerce clause is "shield to protect Indian tribes from state and local interference"); *Washington v. Confederated Colville Tribes,* 447 U.S. 134, 157 (1980) (Indian commerce clause prevents "undue discrimination against, or burdens on, Indian commerce"). *See also, Ramah Navajo School Board, Inc. v. Bureau of Revenue,* 458 U.S. 832, 845-46 (1982). As a pass-through tax on treaty Indian fishermen, "it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve" and is therefore inconsistent with the fishing rights reserved by treaty. *Tulee v. Washington, supra,* 315 U.S. at 685.

Furthermore, one of the principal Indian policies of this and prior Administrations has been to decrease the financial dependence of Indians and Indian tribes upon the United States. Attaining that goal depends on the existence of an adequate tribal tax base. *See e.g., Merrion, supra,* 455 U.S. at 138, n.5. The Puyallup Tribe and other fishing tribes tax their own fishermen—it is one of their few sources of tax revenue. Washington's tax scheme effectively deprives the Puyallup Tribe and similar tribes of potential tax revenues by not leaving room for tribal taxes. Indian fishermen simply will not be able to compete effectively and pay the tribal taxes if they are also required to shoulder the economic burden of the State's tax despite their federal immunity from state taxation.

Cf. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 446-48 (1979).

CONCLUSION

The questions presented by this case are substantial. The State of Washington has adopted a taxing scheme which unduly burdens, and discriminates against, Indian commerce. In addition, the Washington Supreme Court's decision circumvents federal law that treaty fishing rights may not be taxed. The implementation of the Washington Supreme Court's holding defeats executive policy encouraging the financial independence of tribal governments. Probable jurisdiction should be noted and the decision below should be reversed, either summarily on the basis of *Tulee v. Washington, supra,* and *Washington v. Fishing Vessel Ass'n, supra,* or after plenary hearing.

Respectfully submitted,

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January, 1987

APPENDIX

Section 14 of the Puyallup Fisheries Management Code provides:

a. The Puyallup Nation hereby imposes a gross receipts tax on each tribal member and authorized fisher who engages in commercial fishing pursuant to the treaty fishing rights of the Nation and on each act of fishing pursuant to those rights. The tax is imposed for the privilege of exercising those treaty fishing rights, in order to help defray a portion of the cost of the Nation's fisheries management and regulatory program.

b. The tax shall be imposed in the sum of two (2) cents per pound of fish sold by a tribal member or other authorized fisher. One-half of the revenue raised by that tax shall be deposited to the budget of the Fisheries Management Division; one-half of the revenue shall be deposited to the Tax and Licensing Account.

* * *